

June 1982

Propaganda as Positive Law: Section 3 of the Commodity Exchange Act - (A Case Study of How Economic Facts Can Be Changed by Act of Congress)

John H. Stassen

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Law Commons](#)

Recommended Citation

John H. Stassen, *Propaganda as Positive Law: Section 3 of the Commodity Exchange Act - (A Case Study of How Economic Facts Can Be Changed by Act of Congress)*, 58 Chi.-Kent L. Rev. 635 (1982).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol58/iss3/2>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.

PROPAGANDA AS POSITIVE LAW: SECTION 3 OF THE
COMMODITY EXCHANGE ACT
(A CASE STUDY OF HOW ECONOMIC
FACTS CAN BE CHANGED BY
ACT OF CONGRESS)

JOHN H. STASSEN*

The idea for this article was nurtured in the spring of 1980 when Congress Assembled was devoting its substantial talent and energy to a typically in-depth, probing and dispassionate analysis of Federal Reserve Board Chairman Paul Volcker's nocturnal attire and other great issues of state relating to the so-called Silver Debacle.¹

It was during that period that a prominent economist, a Harvard Ph.D. no less, was contributing greatly to Congress' better understanding of the economics of futures markets. He did this through his incessant repetition of the phrase "speculative bubble" and his unabashed assertion before *several* congressional committees that the best futures markets are those with relatively modest levels of speculation, such as the Kansas City Board of Trade or the Minneapolis Grain Exchange. This assertion was made despite the clear findings of Professors Roger

* Partner, Kirkland & Ellis, Chicago, Illinois. This article is a revised and updated version of a paper which appeared in *Research on Speculation Seminar Report*, copyright 1981, Board of Trade of the City of Chicago. The author notes that legislation may be introduced in 1982 which might affect several of the sections of the Commodity Exchange Act discussed in this article.

1. In late 1979 and early 1980, silver prices, both cash and futures, fluctuated sharply, soaring from less than \$10.00 per ounce in August, 1979, to a peak of over \$50.00 per ounce in mid-January, 1980, then plummeting back to \$10.80 in late March, 1980. Obviously, fortunes were made and lost—and the entire episode motivated four separate congressional inquiries. The allusion is to the considerable interest shown in whether Federal Reserve Board Chairman Volcker was wearing pajamas when he met late one evening with a delegation of bankers to discuss the financing of Hunt-family silver positions. See, e.g., S. FAY, *BEYOND GREED* 229 (1982). Mr. Volcker maintains that he was not wearing pajamas. *CFTC Regulatory Authority Review: Hearings Before the Subcommittee on Conservation and Credit of the House Committee on Agriculture*, 96th Cong., 2d Sess. 104 (1980) [hereinafter cited as *House Agriculture Committee Hearings*] (statement of P.A. Volcker). As to Congress' review of the so-called Silver Debacle, see also *Silver Prices & the Adequacy of Federal Actions in the Marketplace, 1979-80: Hearings Before a Subcommittee of the House Committee on Commerce, Consumer & Monetary Affairs*, 96th Cong., 2d Sess. (1980); *Price Volatility in the Silver Futures Market: Hearings Before the Subcommittee on Agricultural Research & General Legislation of the Senate Committee on Agriculture, Nutrition & Forestry*, 96th Cong., 2d Sess. (1980) [hereinafter cited as *Senate Agriculture Committee Hearings*]; *Margin Requirements for Transactions in Financial Instruments: Hearings Before the Senate Committee on Banking, Housing & Urban Affairs*, 96th Cong., 2d Sess. (1980) [hereinafter cited as *Senate Banking Committee Hearings*].

Gray and Holbrook Working that just the opposite is true.² The economist, of course, was Dr. James Stone, the then Chairman of the Commodity Futures Trading Commission (CFTC), the independent federal agency that regulates futures trading in the United States.³

One was reminded at the time of an observation of two British economists, Goss and Yamey, in their *Economics of Futures Trading*: "The ease with which futures trading can be made the scapegoat for price levels and price movements considered to be against the public interest explains much ill-considered official intervention and regulation."⁴

There are several impressive examples in the Commodity Exchange Act, a venerable patchwork creation now sixty years young, of our best and brightest in Washington. John Rainbolt, who helped write several important chunks of it in 1974 before moving on to the CFTC he helped create, once described it as Congress' "longest chain letter." It may well be. Congress after Congress—at least fifteen by rough count, beginning in 1936 and as recently as June of 1980—have busily scribbled away. They have added postscripts, but have never edited the core text, which was hastily contrived in 1922 from the tattered remnants of a 1921 statute that the United States Supreme Court had just declared unconstitutional.⁵

The resulting Act is replete with solemn declarations of economic truth. Legislating in the 1920's and 1930's was something of a pseudoscience. It was not enough merely to regulate, prohibit and sanction. One had to do so "scientifically," basing legislation on immutable facts to justify ever more expansive interpretations of the Constitution's

2. Gray, *Price Effects of a Lack of Speculation*, in SELECTED WRITINGS ON FUTURES MARKETS 191 (1977); H. WORKING, *Economic Functions of Futures Markets*, in SELECTED WRITINGS OF HOLBROOK WORKING 267 (1977).

3. See, e.g., *House Agriculture Committee Hearings*, *supra* note 1, at 87, 178; *Senate Agriculture Committee Hearings*, *supra* note 1, at 6; *Senate Banking Committee Hearings*, *supra* note 1, at 147. *Contra*, Gray, *Price Effects of a Lack of Speculation*, in SELECTED WRITINGS ON FUTURES MARKETS 191 (1977); H. WORKING, *Economic Functions of Futures Markets*, in SELECTED WRITINGS OF HOLBROOK WORKING 267, 281 (1977). For Dr. Stone's defense of his use of the term "bubble," see J.M. STONE, ADDITIONAL COMMENTS ON THE INTERAGENCY STUDY OF SILVER MARKETS 5-6 (June 1981).

4. B. GOSS & B. YAMEY, *THE ECONOMICS OF FUTURES TRADING* 47 (1976). Thus Hoffman, writing in 1932, described "future trading" as a "political football" and "an excellent field for controversy and one which political leaders have exploited to the fullest extent." G. HOFFMAN, *FUTURE TRADING UPON ORGANIZED COMMODITY MARKETS IN THE UNITED STATES* 5 (1932).

5. See *Hill v. Wallace*, 259 U.S. 44 (1922). Additional—and extensive—amendments to the Commodity Exchange Act are expected in the Fall of 1982, as a result of Congress' quadrennial review of CFTC activities. See 7 U.S.C. § 16(d) (Supp. IV 1980).

commerce clause.⁶ In the Commodity Exchange Act, this involved declaring certain economic verities, such as the true nature, scope and impact of "speculation." Really, it is a puzzle why so many economists continue to busy themselves studying these issues—analyzing data, constructing formulae, drafting learned papers. Congress has answered their questions already, right in the Commodity Exchange Act.

One example is section 4a, which permits the CFTC to impose speculative limits.⁷ Implicit in this section are certain interesting assumptions. The section declares that speculation can be "excessive"; and that, if "excessive," it will cause "fluctuations in price" which, in turn, are "sudden," "unreasonable" or "unwarranted." And this results in an "undue and unnecessary burden on interstate commerce." On this foundation, Congress has erected a system for imposing position and trading limits.

Dr. Thomas Hieronymus has done some interesting research on this, however, which refutes any empirical basis for Congress' declarations.⁸ The economic studies which Congress apparently relied upon—or the studies that at least were available at the time that section 4a was enacted in 1936—were made in the 1920's. Although, as Dr. Hieronymus observes, they were "interesting pieces of pioneering work," they were seriously flawed. To put it most charitably, the legislation authorizing speculative position limits was, at the very least, on "shaky ground."⁹

Another example is the Act's ban on agricultural options, also enacted in 1936.¹⁰ It appears that there never has been an economic study of any comprehensive scope into agricultural options trading. Certainly there has never been a study which concludes that options on agricultural commodities necessarily lack substantial economic justification, or that they have, as was apparently assumed in 1936, a theoretically destabilizing influence on commodity markets.

6. U.S. CONST. art. I, § 8, cl. 3.

7. Commodity Exchange Act § 4a, 7 U.S.C. § 6a (1976) (original version at ch. 545, § 5, 49 Stat. 1492 (1936)). The constitutionality of this provision was implicitly upheld in *Moore v. Chicago Mercantile Exch.*, 90 F.2d 735, 739 (7th Cir.), *cert. denied*, 302 U.S. 710 (1937). *See also* Board of Trade of Kansas City v. Milligan, 90 F.2d 855, 860 (8th Cir.), *cert. denied*, 302 U.S. 710 (1937). "Speculative limits" prescribe the maximum size of a speculative trader's futures position, or the maximum number of contracts a trader may buy or sell on a given trading day.

8. T. HIERONYMUS, *ECONOMICS OF FUTURES TRADING* (2d ed. 1977).

9. *Id.* at 334-37.

10. Commodity Exchange Act § 4c, 7 U.S.C. § 6c (1976 & Supp. IV 1980) (original version at ch. 545, § 5, 49 Stat. 1494 (1936)). The constitutionality of this provision was expressly upheld in *Moore v. Chicago Mercantile Exch.*, 90 F.2d 735, 740 (7th Cir.), *cert. denied*, 302 U.S. 710 (1937). *See also* Board of Trade of Kansas City v. Milligan, 90 F.2d 855, 858 (8th Cir.), *cert. denied*, 302 U.S. 710 (1937).

One study was done in 1934 by the United States Department of Agriculture (USDA), but it recognized, in part at least, that option or "privilege" trading on the Chicago Board of Trade was useful, a source of profit to some, and that it provided very low cost protection against price changes.¹¹ Nonetheless, Congress proceeded to declare trading in agricultural options to be absolutely illegal.¹² This ban on options trading may simply have been placed in the Act because no respectable interests had any incentive to come forward to demonstrate that options had utility and that they were not the culprit in an era of great market instability. One must suspect that this was the case. To save traditional futures, options were offered up for sacrifice.

Yet another example is the 1958 onion trading ban. The Commodity Exchange Act now embraces everything in this world as a potential "commodity," from silver to securities to space on a ship. Only one thing is excluded: onions.¹³ Contrary to what any educated person might think, onions are simply not a "commodity." Furthermore, it is actually a crime to trade them for future delivery.¹⁴ (Whether leeks are embraced by this ban is still open to debate.)¹⁵

The onion ban in 1958 was spearheaded in good part by an otherwise not-so-radical congressman from Michigan by the name of Gerald Ford.¹⁶ The reason for the ban was stated in a Senate Agriculture Committee report: "It now appears"—it appeared to Congress at least—"that speculative activity in the futures markets causes such severe and unwarranted fluctuations in the price of cash onions as to require complete prohibition of onion futures trading in order to assure

11. UNITED STATES DEP'T OF AGRICULTURE, CIRCULAR NO. 323, TRADING IN PRIVILEGES ON THE CHICAGO BOARD OF TRADE 78 (1934).

12. See *Hearings Before the Senate Committee on Agriculture & Forestry on H.R. 6772*, 74th Cong., 2d Sess. 220-24 (1936); *Hearings Before the House Committee on Agriculture on H.R. 11955*, 93d Cong., 2d Sess. 192-93 (1974) (testimony of Dr. Henry G. Jarecki). See generally *Legislation, The Commodity Exchange Act of 1936*, 85 U. PA. L. REV. 614 (1937).

13. See 7 U.S.C. § 2 (1976) ("onions" excluded from definition of "commodity").

14. 7 U.S.C. § 13-1 (1976) (trading of onion futures a misdemeanor punishable by a \$5000 fine).

15. Enforcement of the onion trading ban was actually enjoined from September 26, 1958 to November 10, 1959. See *Chicago Mercantile Exch. v. Tieken*, 178 F. Supp. 779, 780-81 (N.D. Ill. 1959). Ultimately, however, the ban was upheld as constitutional. *Id.* at 785-86. See also *Chicago Mercantile Exch. v. Tieken*, 177 F. Supp. 660 (N.D. Ill. 1959). The *Tieken* decision is discussed further at note 76 *infra*.

16. As for President—then Representative—Ford's role, see H.R. 1933, 85th Cong., 1st Sess. (1957), Mr. Ford's bill "to amend the Commodity Exchange Act to prohibit trading in onion futures [sic] commodity exchanges." Mr. Ford's onion-ban bill was referred to the House Agriculture Committee on January 5, 1957. 103 CONG. REC. 228 (1957). The bill which eventually cleared the committee was an earlier but identical bill (H.R. 376), passage of which Mr. Ford "urge[d] most earnestly" to eliminate "the evils of the present system." 104 CONG. REC. 4322 (1958) (remarks by Rep. Ford).

the orderly flow of onions in interstate commerce."¹⁷ A noble objective, of course.

That judgment was reached, however, notwithstanding the USDA's own position at the time that "[t]he prohibition of futures trading in onions could not be expected to eliminate erratic price movements traditional in the marketing of this commodity."¹⁸ The USDA was right for once, as Dr. Roger Gray has demonstrated in his moving essay, *Onions Revisited*.¹⁹

SECTION 3 OF THE COMMODITY EXCHANGE ACT

The lesson from this is that the culprit is almost always perceived to be "speculation." When in doubt, blame the speculator. The tendency is to make futures the scapegoat, as Goss and Yamey correctly have observed.

The focus of this article, however, is not onions, options or limits, as fascinating as they each are, but section 3 of the Commodity Exchange Act.²⁰ A Mr. Jones of Texas, one of the Act's²¹ most ardent supporters in 1922, observed that it is the very "foundation for the legislation."²²

Section 3 states that "transactions in commodities. . . known as 'futures' are affected with a national public interest." They are "carried on in large volume." The "prices involved. . . are generally quoted and disseminated," etc. That much is clearly true. But section 3 goes on to declare that:

[T]he transactions and prices of commodities on. . . boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently oc-

17. S. REP. NO. 1631, 85th Cong., 2d Sess. 1 (1958). Representative Poage was more candid: "The producers feel this futures trading is making the price of onions too high when there are few onions and too low when there are plenty of onions." 104 CONG. REC. 17,833 (1958) (remarks of Rep. Poage). That was good enough for the House of Representatives, which promptly agreed to the ban. *Id.* at 17,834.

18. Letter from E.T. Benson, Secretary of Agriculture, to Rep. Harold D. Cooley, Chairman, House Committee on Agriculture (March 13, 1957), reprinted in S. REP. NO. 1631, 85th Cong., 2d Sess. 2 (1958).

19. Gray, *Onions Revisited*, 45 J. OF FARM ECON. (May 1963), reprinted in SELECTED WRITINGS ON FUTURES MARKETS 325 (1977). See also Johnson, *Effects of Futures Trading on Price Performance in the Cash Onion Market, 1930-68*, in SELECTED WRITINGS ON FUTURES MARKETS 329 (1977). It is a pity to think of so many great minds devoting so much time to such a humble herb.

20. 7 U.S.C. § 5 (1976) (originally enacted as Act of Sept. 21, 1922, ch. 369, § 3, 42 Stat. 999 (1922)).

21. "Act" refers to the Grain Futures Act which, in 1936, was renamed the Commodity Exchange Act. See Act of June 15, 1936, ch. 545, 49 Stat. 1491 (1936).

22. 62 CONG. REC. 9437 (1922) (remarks of Rep. Jones).

cur as a result of such speculation, manipulation or control, which are detrimental to the producer or the consumer and the persons handling commodities. . .and such fluctuations in prices are an obstruction to and a burden upon interstate commerce. . .and render regulation imperative for the protection of such commerce and the national public interest therein.²³

Again, in the words of Representative Jones—and this must be emphasized—section 3 “is the statement of the basis” upon which the entire regulation of futures markets is predicated.²⁴ Representative Jones was speaking on June 26, 1922, some forty days after the Supreme Court had declared key provisions of the Future Trading Act of 1921 unconstitutional.²⁵ In forty short days Mr. Jones’ colleagues on the House Agriculture Committee had managed to sift through economic theory and economic literature and determine, once and for all, in the most unequivocal terms, certain important, fundamental truths concerning the nature of “speculation.” How they spent those forty days will be addressed below.

THE 1921 LEGISLATION

The legislation declared unconstitutional was the Future Trading Act of 1921.²⁶ To put this in some perspective, one must look at that Act, adopted in 1921 in an orgy of populist rhetorical excess, and particularly at the remarks of Senator Capper of Kansas, who was its sponsor in the Senate. Senator Capper was a marvelous orator, and he must be quoted, just briefly, in order to convey the mood of the time:

Mr. President, it is nothing new that we hear to-day from the producers of food, from grain dealers and millers, and from the victims of speculation carried on without restriction, of the abominations of speculation in these basic products.

During the past year the price of wheat and corn has been determined to a large extent not by the demand and supply of the commodity itself but by the fabulous quantities sold on the exchange that never had any existence, that no grain farmer in the world ever planted, ever toiled over its cultivation and harvest, or offered for sale.

. . . .

Mr. President, it is against the law to run a gambling house anywhere within the United States. But to-day, under the cloak of business respectability, we are permitting the biggest gambling hell in the world to be operated on the Chicago Board of Trade. The grain

23. 7 U.S.C. § 5 (1976).

24. 62 CONG. REC. 9437 (1922) (remarks of Rep. Jones).

25. *Hill v. Wallace*, 259 U.S. 44 (1922).

26. Act of Aug. 24, 1921, ch. 86, 42 Stat. 187 (1921).

gamblers have made the exchange building in Chicago the world's greatest gambling house. Monte Carlo or the Casino at Habana are not to be compared with it.²⁷

This was mild stuff, however. The good Senator knew how to get people really excited, which he did. (The *Congressional Record* frequently indicates "applause" and even "laughter" during his tirade on the evils of the great grain exchanges.)

So Senator Capper proceeded with a litany of horror stories, to the delight of his audience. One involved a gentleman from "Prophetstown, one of the largest grain centers of Illinois":

Prophetstown's most prominent citizen and bank president, George E. Paddock, is now a fugitive from justice at the age of 72. His son, the bank's cashier, indicted with him for embezzlement of \$150,000 of depositors' funds, has recently given himself up to the sheriff. Behind the bank room proper examiners found a secret chamber with direct wire connections to Chicago brokerage houses.²⁸

Another tragedy revolved around murder and suicide:

F.R. Robertson, prominent real estate and insurance man of Newton, Ill., in a fit of insanity caused from brooding over losses on the Chicago Board of Trade, shot and killed Charles Sutton, member of a grain brokerage firm, then killed himself.²⁹

That is more effective than a reparations proceeding under the Commodity Exchange Act, to say the least. These populist politicians were marvelous orators, of course. What they lacked in economics, they certainly made up for in elocution.

HILL V. WALLACE

The case which declared Senator Capper's 1921 brainchild unconstitutional was *Hill v. Wallace*.³⁰ The case was brought by eight disgruntled members of the Chicago Board of Trade against the Secretary of Agriculture and various federal officials, including the revenue agents in Chicago who were supposed to collect the tax that the Act imposed on futures transactions, but also against the Board of Trade itself, and its directors and officers.

The disgruntled members of the Board of Trade had been spurned in their entreaties to the Board to launch a constitutional challenge in the name of the Board of Trade itself. These members went so far as to allege in their complaint that the Board of Trade officials were fearful

27. 61 CONG. REC. 4761, 4763 (1921) (remarks of Sen. Capper).

28. *Id.* at 4763.

29. *Id.*

30. 259 U.S. 44 (1922).

of antagonizing government officials.³¹ They probably were, since there was considerable sentiment in Congress to close down the Board of Trade altogether. The Future Trading Act represented a relatively moderate piece of legislation compared to what Senator Capper and his colleague in the House of Representatives, Representative Tinch, actually wanted and for which they had campaigned for many years.³²

In any event, the principal gripe of the eight disgruntled Chicago Board of Trade members was not the prospect of federal regulation *per se*, but the foisting of agricultural cooperatives upon the exchanges. Co-ops rebated commissions—thus threatening the livelihood of commission-dependent traders.

Chief Justice, ex-President Taft wrote the Court's opinion. He found, first, that the Board of Trade should have brought the lawsuit in its own name, to which Justice Brandeis retorted, in so many words, that that was a ridiculous notion. Why should the Board of Trade have to "play the knight-errant" and "tilt" at statutes whenever some disgruntled member suspected that a law was unconstitutional?³³

But getting to the merits, Chief Justice Taft and Justice Brandeis were in full agreement. The Act was, in essence and on its face, not a revenue-raising statute. It could not be sustained under Congress' taxing powers. Nor could it be sustained under the commerce clause, because it really had not been intended to be based on that, and there

31. *Id.* at 61.

32. As a contemporary observer noted:

The direct impetus for it [futures trading legislation] is to be found in the desire to relieve farmers from the critical condition created by the fall in agricultural prices in 1920 and 1921. . . . The conclusion was at once drawn that the wild fluctuations and sharp decline in prices were because of "speculation on the board of trade." Some form of regulation was made certain. During the short session of the 66th Congress, which convened in December, 1920, half a dozen bills were introduced for this purpose. The plan of these bills ranged all the way from a simple provision for the admission of producers' associations to membership on boards of trade, to the suppression of all future trading and speculation.

Virtue, *Legislation for the Farmers: Packers and Grain Exchanges*, 37 Q.J. ECON. 687, 693-94 (1923) [hereinafter cited as Virtue]. There was ample precedent for such extreme proposals. In 1890, for example, the House Agriculture Committee reported out a bill, H.R. 5353, 51st Cong., 1st Sess. (1890), which would have taxed out of business so-called "dealers" in "contracts or agreements for . . . future delivery" known as "options" and "futures." In the view of the committee, those who dealt in "'options' and 'futures' contracts, which is mere gambling, no matter what less offensive name such transactions may be designated, neither add to the supply nor increase the demand for consumption, nor do they accomplish any useful purpose by their calling; but on the contrary, they speculate in fictitious products." Lumped together for condemnation were all the "'bulls' and the 'bears' who deal in 'puts' and 'calls' and 'futures' contracts in the 'bucket shops' and 'grain pits' of the country." H.R. REP. NO. 1321, 51st Cong., 1st Sess. 2 (1890). Similar legislation was reported out by the House Agriculture Committee in 1892, with equal invective. See H.R. REP. NO. 969, 52d Cong., 1st Sess. (1892).

33. 259 U.S. at 74 (Brandeis, J., concurring).

were no congressional findings or evidence to support the statute on that basis. However, the Chief Justice did volunteer that Congress could bring futures trading within its regulatory power if it concluded from evidence before it that such trading is "directly interfering with interstate commerce so as to be an obstruction or a burden thereon."³⁴

As Representative Ellis of Missouri observed at the time: "[T]he writer of the opinion, the distinguished Chief Justice, was prompted to depart somewhat from the direct path to his conclusions to suggest another possible basis for the bureaucratic sway the promoters of this legislation have so ardently craved."³⁵ Ellis also noted that the Chief Justice's opinion reflected in that dicta "a tolerance of bureaucratic control of private business with which I have neither sympathy nor patience."³⁶

THE LEGISLATIVE FIX

But the seed had been sown. The legislative draftsmen at the United States Department of Agriculture, seizing upon Taft's gratuitous suggestion, immediately took pen in hand to give the Chief Justice the magical language he wanted.

The Future Trading Act was declared unconstitutional on May 15, 1922,³⁷ and within less than a month—by June 13, 1922—not only had a new bill been introduced, but House "hearings" had been held and a full-fledged Agriculture Committee report had been filed with the House. The subject, miracle of miracles, was: The "Prevention and Removal of Obstructions and Burdens Upon Interstate Commerce In Grain, By Regulating Transactions on Grain-Future Exchanges."

The Department of Agriculture lawyers simply had reframed the 1921 Act under the Constitution's commerce clause. To do so, the department lawyers felt it necessary, given the case law of the time, to

34. *Id.* at 69. An earlier (but non-prohibitory) "stamp tax" on futures transactions (imposed to help finance the Spanish-American War) had been upheld by the Supreme Court in *Nicol v. Ames*, 173 U.S. 509 (1899). The decision in *Hill* did not overturn the prohibitory tax on options transactions also contained in the Future Trading Act. That provision did not fall until 1926. *Trusler v. Crooks*, 269 U.S. 475 (1926). (Mr. Crooks was the tax collector, not the options trader. The options trader, Mr. Trusler, was a Chicago Board of Trade member and a constituent of Senator Capper. *Id.* at 481.)

35. 62 CONG. REC. 9419 (1922) (remarks of Rep. Ellis).

36. *Id.*

37. The Court was in a very nasty mood that day. It also declared unconstitutional, for similar reasons, the Child Labor Tax Law. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922). Earlier in the same term, however, the Court had upheld the constitutionality of the Packers and Stockyards Act of 1921 (enacted in the same month that the Future Trading Act was enacted). *Stafford v. Wallace*, 258 U.S. 495 (1922). The Court's reasoning in *Stafford* was the basis for the Chief Justice's suggestion in *Hill* as to how to rewrite the Future Trading Act.

present findings of fact—bases and truths—upon which Congress could construct a regulatory scheme. They were duly presented to Congress and are contained in section 3.

Section 3 was written in the Department of Agriculture. The House debates make that clear. As Representative Ellis succinctly put it, evoking the memory of a prominent Illinois railroad lawyer who later traveled to Gettysburg as President: "It is absolutely a bureau bill—of the bureau, by the bureau, and for the bureau." And section 3 was, as he also observed, the "crux" of the new legislation.³⁸

The nature of the House Agriculture Committee's "deliberations" (which also gives one some clue as to how the congressional process operates generally) is chronicled in a minority report filed by Representative Rainey of Illinois.³⁹

On Wednesday, June 7, 1922, an assistant to the Secretary of Agriculture came up to the Hill, chatted with the boys (this was 1922) and assured them that it was a good bill. (Of course it was. He wrote it.) The next two days, June 8 and 9, the grain exchange people came in, quite meekly one gathers, and suggested a few technical improvements here and there, but generally accepted the new statute as proposed. They had had virtually no time to prepare, and they knew, of course, that the situation could be worse.

Further hearings were scheduled for Monday, June 12, to take the testimony of officials of the Minnesota Railway and Warehouse Commission, which had "long and valuable experience" in the administration of similar grain laws. Much attention was given to the fact that these emissaries were coming all the way from Minneapolis to testify. They were taking the train, of course, being Railway Commission people—not that they had any choice in 1922.

While enroute to Washington, a severe storm of some sort delayed them in Wisconsin for twelve hours. Unable to arrive in Washington in time for the Monday hearings, the Minnesotans dutifully telegraphed the House Agriculture Committee, requesting that their appearance be rescheduled for Tuesday. The committee ignored the

38. 62 CONG. REC. 9419 (1922) (remarks of Rep. Ellis). G.O. Virtue, writing in 1923, described the redrafting process as follows: "Acting on this [the Chief Justice's] amiable suggestion, the friends of the measure introduced a new bill. . . the short title was changed. . . and a new section [3] was added. . . after the fashion of the preamble to a seventeenth-century statute. . . ." Virtue, *supra* note 32, at 697.

39. See H.R. REP. NO. 1095, 67th Cong., 2d Sess. 4-12 (1922); see also 62 CONG. REC. 9420 (1922) (remarks of Rep. Ellis).

request, however, and proceeded on the 12th of June, 1922, to "mark-up" the new Capper-Tincher-USDA bill.

Representative Rainey recounts that, halfway through the actual reading of the bill, a bell rang for a quorum call on the House floor. At that point the legislators stopped the "mark-up" process and voted, then and there, to report the bill to the full House. There was no further reading, and there were no committee amendments.⁴⁰

HOUSE "DEBATES"

The bill went to the floor of the House a scant two weeks later. The debates suggest that most of the people had not read the bill, and no doubt that was the case. It certainly is the case today with commodities legislation. At least the record establishes that the bill was never read in full by the reporting committee.

The House Agriculture Committee's report states that after its hearings, the committee had solemnly concluded that transactions on the grain exchanges are indeed "extremely susceptible to speculation, manipulation, and control, and that sudden and unreasonable fluctuations in the prices thereof often occur, as the result of such speculation, manipulation, and control; and that these fluctuations are an obstruction to and a burden upon interstate commerce."⁴¹ The committee did not find it necessary to submit any evidence for that unequivocal conclusion. It merely referred generally to "volumes of testimony given by the prominent men of the Nation which uphold the committee in its conclusion."⁴² End of majority report. It was three pages long. (The minority report was much longer.)⁴³

The committee did observe that it was motivated, in particular, because, immediately after the Supreme Court decision, there had been a "straight-out manipulation" of Chicago wheat futures, during which prices dropped thirty-two cents a bushel in a mere fifteen days.⁴⁴ One has to remember that a "manipulation" back then always meant that prices were going down. The "grain gamblers" were not jacking prices up. They were always driving prices down. That is what upset the people in Kansas. They saw prices going down because of "speculation" and "manipulation," but never because of decreased demand for

40. H.R. REP. NO. 1095, 67th Cong., 2d Sess. 4-5 (1922) (minority views of Rep. Rainey).

41. *Id.* at 2.

42. *Id.*

43. *Id.* at 4-12.

44. *Id.* at 2.

their oceans of grain. Today, one generally thinks of "manipulation" as just the opposite.

The committee took the view that this "straight-out manipulation" of Chicago wheat futures had occurred because of the Supreme Court decision. That is, as a result of the decision, traders no longer had to file reports with the USDA and, therefore, felt perfectly free to "manipulate."⁴⁵ The committee did *not* note, however, that enforcement of the Act's reporting requirements had been enjoined in Chicago, and that no one in Chicago had ever filed a report.⁴⁶ So there was absolutely no basis for that conclusion.

Further, their figures were wrong. The price had not changed the way they said it had.⁴⁷ Thus, there were factual errors in both instances. The committee concluded, nonetheless, that section 3 "sets forth [the situation] in detail," and was "fully supported by an abundance of evidence introduced before the committee."⁴⁸

It is important to note that in reframing the 1921 bill, the USDA draftsmen—and Representative Tincher—did have to make a significant concession. Representative Tincher, for example, had spent much of his public career lambasting the grain exchanges. His whole purpose in going to Congress, it would seem, was to vilify the exchanges. To him, futures trading *was* a "gambling hell," or so he often said.

Populists like Tincher now had to concede, however, in the preamble of section 3, that there was really something salutary and "in the national public interest" about this "gambling hell," but that the marvelous process called futures trading was somehow being impeded by manipulation and excessive speculation and, thus, interstate commerce was burdened. Clearly, that was a monumental concession for a man like Tincher.

As Representative Ellis observed on the House floor: "[M]aking a virtue of necessity, the bureau solicitor, special pleader, asks us to find as a further fact that these transactions, while normally wholesome and salutary, are susceptible of control and manipulation. . . ."⁴⁹ He further noted that "section 3 has been painstakingly—perhaps I should

45. *Id.*

46. *See Hearings Before the Senate Committee on Agriculture & Forestry on H.R. 11843*, 67th Cong., 2d Sess. 18 (1922) (testimony of L.F. Gates).

47. *See id.* at 35-36 (testimony of L.L. Winters). In *Dickson v. Uhlmann Grain Co.*, 288 U.S. 188 (1933), Justice Brandeis described this decline in prices as the "cardinal argument" for the passage of the Grain Futures Act. *Id.* at 199 n.4.

48. H.R. REP. NO. 1095, 67th Cong., 2d Sess. 3 (1922).

49. 62 CONG. REC. 9420 (1922) (remarks of Rep. Ellis).

not say cunningly—contrived to serve the one definite purpose.”⁵⁰ That purpose, of course, was to convince Chief Justice Taft and his Brethren that the new Act was constitutional.

The evidence before the House, on this particular bill anyway, consisted of the solicitor of the USDA saying that the legislation was written to be constitutional, and that he had included those “facts” in section 3 for that reason and that reason alone. A Mr. Wells of Minneapolis, a vice-president of Peavey & Company, had pointed out to the committee, however: “I fail to find in the record any testimony from men of experience that transactions are extremely susceptible to speculation, manipulation, and control.”⁵¹

In any event, the bill was brought to the floor of the House on June 26, 1922. The rule for debate provided for but two hours of general debate. It was brought “under whip and spur,” as Mr. Ellis pointed out.⁵² He also volunteered that:

There is nothing in it to praise; there is everything to condemn. The bad features of the old bill are made distinctly worse; there is nothing contained in it to redeem it. The old bill violated a party promise and an administration pledge to keep the Government out of private business. This bill does all that and more; it seeks to broaden the scope for governmental, bureaucratic domination of private enterprises. More than all, and worse than all, this bill reeks of populism.⁵³

Having sniffed out his prey, Ellis proceeded to deliver a marvelous diatribe against populism in general. Again, there is applause and laughter indicated throughout the debate transcription. The people in the gallery were obviously quite excited about the matter, on both sides of the question.

Representative Ellis did know his economics. He and several of his colleagues were able to make some rational, intelligent statements. For example, it was duly pointed out that grain futures trading had a stabilizing influence, for which the world was a better place.⁵⁴ The

50. *Id.* President Stream of the Chicago Board of Trade, himself making a virtue of necessity, commented in 1923 that “‘American grain exchanges have now been given the stamp of government approval. . . . [This] will tend to encourage the grain trade into greater use of the future trading system for hedging and for commercial price insurance purposes.’” Virtue, *supra* note 32, at 703-04. To Stream’s credit, courts have also read section 3 in this manner, e.g.: “[T]his court can take judicial notice. . . that futures trading is generally accepted, under proper regulation as a useful and lawful business.” *Chicago Mercantile Exch. v. Ticken*, 177 F. Supp. 660, 666 (N.D. Ill. 1959). This is hardly what Capper and Tincher had had in mind in 1921.

51. 62 CONG. REC. 9420 (1922) (remarks of Rep. Ellis quoting Frederick B. Wells).

52. *Id.* at 9418.

53. *Id.*

54. *Id.* at 9420-21 (remarks of Rep. Ellis). See also *id.* at 9428-29 (remarks of Rep. Newton); *id.* at 9435 (remarks of Rep. Rainey); *id.* at 9438 (remarks of Rep. Hull).

statements were good, but no one was really listening. The whole thrust of this opposition exercise was to build a record to demonstrate that, as Ellis said, the bill was "neither good English nor good sense."⁵⁵ It was abominable English and it still is in spite of some later tinkering in the Senate.

Even supporters of the bill recognized its drafting defects. Representative Voigt, a member of the Agriculture Committee, conceded: "The bill before us can hardly be called a perfect piece of legislation. It was drawn and considered rather hurriedly, so that it might pass the House at this session."⁵⁶ (This is still the statute under which the futures industry is regulated.)

In reading the musty old debates, one must come to appreciate particularly Mr. Ellis of Missouri. This choice tidbit from him is worth sharing, although it has little to do with the topic of this article. Mr. Ellis, speaking on the floor of the House concerning the Grain Futures Act, observed, no doubt with a tremor in his voice:

I do not believe, and I doubt that any considerable number of you believe, the experience of recent years, while we have fast multiplied boards, commissions, and like bureaucratic agencies—have been substituting for government by law, government by men—has convinced the American people that Government interference in private enterprises through these instrumentalities has been either wise or salutary.

. . . The American people are becoming mortally tired of having bureau agents nosing about as veritable snoops in their business affairs. The people realize, even if we do not, that we are becoming about as bureaucratic as Russia ever was.⁵⁷

Now that was 1922. Ronald Reagan was still in grammar school.

On the floor of the House on June 26, considerable effort was made, as already pointed out, to amend or water down the excesses of section 3, but without any success. "[T]he steam roller is in operation," Representative Chindblom of Illinois correctly observed.⁵⁸ Each negative assumption of section 3 was challenged, but Representative Tinchler refused to budge.

Among the challengers to section 3 was Representative London: "Of course, there is no such thing as a fluctuation being reasonable or unreasonable."⁵⁹ Representative Chindblom noted: "All of these things [showers in Kansas, heat waves in Missouri, decreased foreign

55. *Id.* at 9421 (remarks of Rep. Ellis).

56. *Id.* at 9428 (remarks of Rep. Voigt).

57. *Id.* at 9419 (remarks of Rep. Ellis).

58. *Id.* at 9435 (remarks of Rep. Chindblom).

59. *Id.* at 9436 (remarks of Rep. London).

demand, severe storms in northwest Canada] caused a fluctuation in prices, and the Congress of the United States solemnly passes legislation under which such fluctuations are described as 'unreasonable.'"⁶⁰ Representative Hull commented: "I am not opposed to the reasonable regulation of grain exchanges. I am opposed to using a bill for propaganda purposes, as is done in section 3 of this bill."⁶¹ And finally, Representative Mills stated that:

[The bill] is one of the worst drawn bills that it has ever been my misfortune to read. . . . Facts are stubborn things. You can not change facts by act of Congress. . . . [T]his proposition is . . . bad from the standpoint of draftmanship, novel in character and thoroughly unscientific. . . .

. . . . The gentlemen from Kansas [Mr. Tincher] asks us to pass a law declaring certain facts to be so, irrespective of whether they are or not, and I submit that that is a thing that can not be done. [Applause.]⁶²

It could. Section 3 passed the House without amendment.⁶³

FINAL ENACTMENT

The Senate acted with somewhat more deliberation. Its Agriculture Committee did not report out the bill until almost two months later, on August 23. As for section 3, the committee did make some changes to correct the obvious grammatical errors of the solicitor of the Agriculture Department. The committee also deleted some "superfluous" words, such as "extremely," when describing the susceptibility of futures markets to "speculation."

Section 3 remained the cornerstone of the new legislation, however. As the Senate Agriculture Committee report explained, most succinctly and to the point: "A recital of the ultimate facts adduced at these hearings . . . is made in section 3 . . . because it is manifest from several recent decisions of the Supreme Court . . . that the Supreme Court attaches great importance to congressional findings."⁶⁴

The Senate report also noted that the measure was "particularly urgent" because farmers were terribly concerned. The price fluctuations which the agricultural economy was experiencing were perceived by the farmers as being caused by "manipulations" on the grain ex-

60. *Id.* at 9437 (remarks of Rep. Chindblom).

61. *Id.* at 9438 (remarks of Rep. Hull).

62. *Id.* (remarks of Rep. Mills).

63. *See id.* at 9440.

64. S. REP. NO. 871, 67th Cong., 2d Sess. 4-5 (1922). *See also Hearings Before the Senate Committee on Agriculture & Forestry on H.R. 11843*, 67th Cong., 2d Sess. (1922).

changes. That, the Senate Agriculture Committee said, was the reason why the legislation was so urgent.⁶⁵ The committee did *not* note that a national election was going to be held in November.

The bill passed the Senate on September 14, 1922, after about twenty minutes of debate.⁶⁶

The very next day, September 15, it came back to the House. Congressman Tincher was in a real pickle. The Senate had deleted several of his most favored rhetorical excesses—declarations that all good Kansans had wanted for decades. He was obviously displeased with that. But he was in a quandary. It was an election year, and he had to get back home to campaign.⁶⁷

The decision was made, albeit reluctantly, to go along with the Senate version, rather than to go to conference and haggle over the Senate deletions. Thus, the House merely adopted the Senate changes verbatim, then and there. On September 15, 1922, by voice vote and without a quorum—the record is clear that there was no quorum—the House agreed to the Senate amendments.⁶⁸ And thus was born the Grain Futures Act, now the Commodity Exchange Act.

Before this happened, of course, several congressmen did question once again each of the “findings” in section 3. Clearly they were doing so in the hope of laying a foundation for a later assault on the constitutionality of the statute. Thus, they went through a tedious exercise of analyzing each phrase, trying to put into the record the fact that Congress was proceeding to make declarations with no factual support whatsoever, and that, in fact, the evidence supported the contrary position.⁶⁹

CHICAGO BOARD OF TRADE V. OLSEN

Indeed, the constitutional challenge did come. The case was *Chicago Board of Trade v. Olsen*.⁷⁰ Obviously, the Board of Trade had learned a lesson. It sued first, rather than having its members sue it. The Board of Trade became the “knight-errant,” “tilting at statutes,” as Justice Brandeis had observed a year earlier.⁷¹

The Board of Trade made a number of allegations in its complaint

65. S. REP. NO. 871, 67th Cong., 2d Sess. 7-8 (1922).

66. See 62 CONG. REC. 12,720 (1922) (remarks of Rep. Newton).

67. See *id.* at 9418 (remarks of Rep. Ellis).

68. See *id.* at 12,723, 12,725.

69. See *id.* at 12,720-25.

70. 262 U.S. 1 (1923).

71. *Hill v. Wallace*, 259 U.S. 44, 74 (1922) (Brandeis, J., concurring).

against the new law—detailing what futures trading was all about. One allegation was that no “corners” had been run on the Board of Trade for *fifteen years*.⁷² They were proud of that fact.

In support of its case, the Board also marshalled some of the best economic minds in America. The record before the Supreme Court reflects that a large number of affidavits were submitted by the Board of Trade in support of its motion for a preliminary injunction, which had been denied by the district court. Chief Justice Taft went on to say: “These contained opinions of many professors of political economy in the colleges of the country to the effect that trading in futures in the long run did not depress prices, but stabilized them.”⁷³

The Chief Justice then proceeded to totally ignore the affidavits and to state the facts in a most self-serving way, along the lines of Representative Tinch and Senator Capper. Taft framed the question presented as “whether the conduct of such [futures] sales [at the Board of Trade] is subject to constantly recurring abuses which are a burden and obstruction to interstate commerce in grain” and whether they are “such an incident of that commerce and so intermingled with it that the burden and obstruction caused therein by them can be said to be direct.” The Board of Trade’s affidavits notwithstanding, Taft’s answer was a ringing “yes” on both counts. The Act was constitutional.⁷⁴

72. 262 U.S. at 9.

73. *Id.* at 10. In commenting on the Chicago Board of Trade’s challenge to the constitutionality of the Grain Futures Act, one writer noted:

That point was strongly contested in the very able brief for the Board of Trade. The question, counsel argued, was one of fact, of “economic or trade law,” not to be settled by the Congressional declaration in section three of the law, but by a resort to expert opinion. Counsel therefore introduced the affidavits of twenty-two professors of economics, bearing on the function of organized speculation, the effect of future trading and speculation on fluctuations and orderly trading.

Virtue, *supra* note 32, at 700-01.

74. 262 U.S. at 36. As was observed in 1934:

The opinion of Mr. Chief Justice Taft is of decided interest in the broad philosophy which it expounds. It clearly goes beyond the current of trade doctrine of the earlier [*Stafford*] case [see note 37 *supra*] and expresses a willingness to proceed on a foundation of “national public interest.” This willingness, thus announced, may well be of extreme importance in furnishing a benchmark for the high court in its later determinations.

... As a legal proposition much encouragement lies . . . for those who believe that progress implies an increase in governmental supervision such as the currently proposed National Securities Act.

Note, *Federal Regulatory Legislation, the Federal Grain Futures Act*, 2 GEO. WASH. L. REV. 457, 459, 462 (1934) (footnote omitted).

And as Judge Friendly recently observed in analyzing Congress’ 1922 opinions now memorialized in section 3, “*Wickard v. Filburn*, 317 U.S. 111 . . . (1942), then lay twenty years in the future.” *Leist v. Simplot*, 638 F.2d 283, 304 (2d Cir. 1980) (footnote omitted), *cert. granted*, 450 U.S. 910 (1981). *Wickard* made it “immaterial” whether a regulated entity’s business is “local or interstate.” *Chicago Mercantile Exch. v. Tiekens*, 178 F. Supp. 779, 783 (N.D. Ill. 1959). Specifically, the Supreme Court upheld provisions of the Agriculture Adjustment Act of 1938 which

The efforts of the distinguished economists whose views were submitted to the Court by the Board of Trade were not totally unavailing. In 1931, a Dominion of Canada report on trading in grain futures was issued. It was largely favorable to futures trading, and made specific note of all the affidavits that had been adduced before the Supreme Court in the *Olsen* case. The Canadian commission accepted these affidavits as the basis for its determination that futures trading had a "marked tendency to stabilize prices."⁷⁵ So the views of the academicians prevailed in Ottawa, if not in Washington.

As for section 3 in particular, the obvious happened. Chief Justice Taft said that the Court was faced with Congress' expressed declarations and that, as a result, the Court "would be unwarranted in rejecting the finding of Congress as unreasonable" and "must accept the view" and was "prevented from questioning the conclusion of Congress."⁷⁶ He also cited, *ad nauseam*, several of those time-honored manipulation and "corner" stories, the celebrated *Patten* case, for

restricted the amount of wheat which Farmer Filburn could grow for his own consumption. In reaching this result, the Court (per Justice Jackson) expressly found *Olsen* to be of aid. 317 U.S. at 128 n.28. See also *id.* at 122 n.21 where the earlier *Hill* decision is consigned to a place of infamy along with the Child Labor Tax Case and other restrictive decisions which Justice Jackson declared had departed from "principles first enunciated by Chief Justice Marshall in *Gibbons v. Ogden*."

75. B. GOSS & B. YAMEY, *THE ECONOMICS OF FUTURES TRADING* 55 n.59, 59 n.97 (1976). Nor was this economic evidence totally lost on Chief Justice Taft. On January 24, 1924, he wrote in *United States v. New York Coffee & Sugar Exch.*, 263 U.S. 611 (1924), that "[t]hose who have studied the economic effect of such Exchanges for contracts for future deliveries generally agree that they stabilize prices in the long run instead of promoting their fluctuation." *Id.* at 619.

76. 262 U.S. at 37-38, 40. The contention that *Olsen* had been overruled by subsequent Supreme Court decisions, particularly *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), was rejected by the United States Court of Appeals for the Seventh Circuit in *Moore v. Chicago Mercantile Exch.*, 90 F.2d 735, 738 (7th Cir.), *cert. denied*, 302 U.S. 710 (1937). See *Legislation, The Commodity Exchange Act of 1936*, 85 U. PA. L. REV. 614, 617 (1937).

Currently, as stated by the United States District Court for the Northern District of Illinois with respect to Congress' 1958 ban on onion futures trading, "the burden is on the party attacking a statute to establish beyond a reasonable doubt that there are no facts—social, economic or otherwise—which would justify the enactment of the law." *Chicago Mercantile Exch. v. Ticken*, 177 F. Supp. 660, 662 (N.D. Ill. 1959). As to the "binding effect. . . of legislative determinations of fact," the court cited *Olsen* as rejecting "the contention that it must take evidence to determine whether facts or conditions, upon which the exercise of constitutional power depended, actually existed." *Id.* at 662. The district court expressly recognized that:

An effective argument can be made from the testimony presented [to Congress] favoring continued trading in onions futures that this legislation is unwarranted and unwise. But these matters were all before Congress; and, Congress, having weighed these factors, has reasonably concluded that a complete prohibition of trading in onions futures is socially and economically desirable. It is not for this court to abort a legislative announcement of general economic policy on the ground that it might consider it to be unwise.

Id. at 666. See also *Chicago Mercantile Exch. v. Ticken*, 178 F. Supp. 779 (N.D. Ill. 1959) (onion trading ban constitutional).

example, involving a prominent member of the Chicago Board of Trade. As for all of those, Dr. Hieronymus' analysis of "historic corners" is recommended—for example, his analysis of the Patten corner. As Dr. Hieronymus has said, that corner was the corner that was not a corner at all.⁷⁷

THE LEGACY OF SECTION 3

All of this would be a mildly amusing historical journey if it were not for the fact that the words so solemnly set forth in section 3 continue to haunt the futures industry. They haunt, at least, the economists and businessmen—and even lawyers—who are concerned about futures markets.

For example, in 1966, when a serious assault was made on margin independence and an effort was made to give the Secretary of Agriculture "standby" authority to set the amount of the security deposits ("margins") required of futures traders, the Assistant Secretary of Agriculture quoted section 3 virtually verbatim. He said that this was Congress' finding in 1922 (after careful, searching and serious scrutiny?) and implied that section 3 was an irrebutable declaration of economic fact: These markets can get out of hand; there are unreasonable speculation and price fluctuations, etc.; and the Government must have total, complete and plenary control over the markets.⁷⁸

As recently as June of 1981, then CFTC Chairman James Stone, in arguing for speculative limits on all commodities, asserted that "Congress has always recognized that there are two sides to speculation," citing section 3.⁷⁹ The disturbing thing is that the populist perception, which ran through the twenties and is best evidenced by the quotations from Senator Capper, obviously still persists. There is a constant danger that this perception will precipitate disastrous legislation.

In the 1974 Senate hearings, for example, a Minnesota farmer appeared before the Senate Agriculture Committee and talked about

77. T. HIERONYMUS, *ECONOMICS OF FUTURES TRADING* 324 (2d ed. 1977).

78. *Hearings Before the Subcommittee on Domestic Marketing & Consumer Relations of the House Agriculture Committee on H.R. 11788*, 89th Cong., 2d Sess. 21 (1966) (testimony of G.L. Mehren). Courts also take the words of section 3 at face value: "Congress has recognized that excessive speculation and manipulation in commodity transactions obstruct and burden interstate commerce and has enacted preventive legislation known as the Commodity Exchange Act." *Miller v. New York Produce Exch.*, 550 F.2d 762, 765 (2d Cir. 1977). See also *United States v. Grady*, 225 F.2d 410, 413 (7th Cir. 1955); *Nelson v. Secretary of Agriculture*, 133 F.2d 453, 455 (7th Cir. 1943); *Moore v. Chicago Mercantile Exch.*, 90 F.2d 735, 740 (7th Cir.), cert. denied, 302 U.S. 710 (1937).

79. J.M. STONE, *ADDITIONAL COMMENTS ON THE INTERAGENCY STUDY OF SILVER MARKETS* 26 (June 1981).

what he called the "price-marketing structures, known as the commodity exchanges." They were "foisted on farmers," had their "inception" in Chicago, and were later given the approval of Congress under the Future Trading Act. "It is my belief," he continued in Capper-like understatement, "that there has been nothing in the history of our Nation that has perpetrated a greater injustice on a segment of our society, other than war and slavery, than this price-marketing structure."⁸⁰ That was in 1974. It should be noted that the 1974 Senate report solemnly restated all of section 3 as being the fundamental premise from which all of this great public-interest regulation flows.⁸¹ So the populist perception does live on.

Most recently in 1980, the futures industry was confronted with Senator Proxmire's contribution to economic enlightenment, a bill "[t]o amend the Federal Reserve Act to authorize the Board of Governors of the Federal Reserve System to establish margin requirements for transactions in financial instruments."⁸² By definition, gold, silver and interest-rate futures were included. Be it enacted by Congress Assembled, etc., that, "To prevent excessive speculation with substantial adverse effects on the Nation's banking system, credit markets, or economy, the Board of Governors shall prescribe regulations. . . ."⁸³

So the ghosts of Tincher and Capper still haunt the halls of Congress. The sort of declaration one finds in Mr. Proxmire's recent bill—about "excessive speculation"—could become law. It *has* become law in section 3 of the Commodity Exchange Act.⁸⁴

80. *Hearings Before the Senate Committee on Agriculture & Forestry on S. 2485, S. 2578, S. 2837, and H.R. 13113*, 93d Cong., 2d Sess. 568 (1974) (testimony of R.M. Langland).

81. S. REP. NO. 1131, 93d Cong., 2d Sess. 14 (1974).

82. *Senate Banking Committee Hearings*, *supra* note 1, at I.

83. *Id.* at 33-37.

84. Any history of section 3 would not be complete without noting that in 1932, when Representative Fiorello LaGuardia of New York introduced legislation to "protect banking and commerce against short sales of securities issued by corporations engaged therein," section 3 of the LaGuardia bill was patterned after section 3 of the then Grain Futures Act. *See Short Selling of Securities: Hearing Before the House Committee on the Judiciary on H.R. 4, H.R. 4604, H.R. 4638, and H.R. 4639*, 72d Cong., 1st Sess. 1, 49 (1932). Testimony on the LaGuardia and related bills, which would have regulated or prohibited short selling of stock, is strikingly reminiscent of Congress' 1921-22 deliberations concerning grain futures trading. For example, a Frank D. Cummings of Portland, Maine, advised the House Judiciary Committee in 1932 that it was confronted "with a very strange and anomalous condition. With every other form of gambling which you can name banned by law, how in Heaven's name can you justify the greatest gambling institution on the face of this earth." *Id.* at 89. Mr. Cummings was referring to the New York Stock Exchange, which at the time was not subject to federal regulation. Obviously, short selling, described by one witness as "selling for future delivery," was "an admirable scapegoat upon whose head we may all read the signs of failure and loss." *Id.* at 160, 161 (statement of Joseph Staggs Lawrence). In fact, according to Representative Adolph Sabath of Illinois, "It was the incessant and wanton destruc-

RECOMMENDATION

From both a legal and an economic perspective, section 3's anti-speculative recitals make no sense. Clearly, they codify a populist, anti-speculative bias which totally misperceives the function and purpose of futures markets as risk-transfer mechanisms where willing speculators assume the price-risks of hedgers in the hope of profit. These declarations are economically unsound and are based on the view that speculation in these markets is aberrant and unwholesome, and the cause of price instability. In fact, just the opposite is the case.

Nor are these recitals in section 3 even "good English."⁸⁵ For example, to proclaim that futures transactions and prices are "susceptible to speculation" is akin to announcing that banking is susceptible to earning interest or that obtaining insurance is susceptible to allocating risks. Thus, the language of section 3 clearly belies a confused state of mind. And from a strictly legal standpoint, section 3 is mere surplusage. Clearly the Commodity Exchange Act can stand today without it.⁸⁶

Obviously, section 3's anti-speculative declarations were intended for "propaganda purposes."⁸⁷ But as Representative Mills observed in 1922: "Facts are stubborn things. You can not change facts by act of Congress."⁸⁸

Facts *are* stubborn things. The errors of section 3 should be corrected.⁸⁹

tion of security and commodity values by short selling that caused, and is prolonging, the depression." *Id.* at 230.

Short-selling has been a favorite whipping boy of politicians for centuries. In 1733, for example, Sir John Bernard introduced a bill in Parliament which became law as An Act to Prevent the Infamous Practice of Stockjobbing. The act banned all option dealing and all sales of stock which the seller did not possess. Its impact on speculation, however, was negligible. See E.V. MORGAN, A HISTORY OF MONEY 135-36 (1965).

For additional background on the history of "future trading" legislation, including efforts predating the 1921 and 1922 Acts, see, e.g., T. HIERONYMUS, ECONOMICS OF FUTURES TRADING 83-93, 311-18 (2d ed. 1977); G. HOFFMAN, FUTURE TRADING UPON ORGANIZED COMMODITY MARKETS IN THE UNITED STATES 364-70 (1932); Campbell, *Trading in Futures under the Commodity Exchange Act*, 26 GEO. WASH. L. REV. 215, 221-26 (1958); Clark, *Geneology and Genetics of "Contract of Sale of a Commodity for Future Delivery" in the Commodity Exchange Act*, 27 EMORY L.J. 1175, 1183-89 (1978); Rainbolt, *Regulating the Grain Gambler & His Successors*, 6 HOFSTRA L. REV. 1 (1977); Note, *Federal Regulation of Futures Trading*, 60 YALE L.J. 822, 830-36 (1951).

85. See 62 CONG. REC. 9421 (1922) (remarks of Rep. Ellis).

86. See note 74 *supra*.

87. See 62 CONG. REC. 9438 (1922) (remarks of Rep. Hull).

88. *Id.* (remarks of Rep. Mills).

89. An amended section 3 might read as follows (deletions in brackets; new language italicized):

Sec. 3. Transactions in commodities [*involving the sale thereof for future delivery*] as commonly conducted on boards of trade *under special regulations and conventions which*

serve to facilitate hedging and speculation by promoting exceptional convenience and economy of the transactions and which are known as "futures" or "options" are affected with a national public interest; [that] such transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling commodities and the products and byproducts thereof in interstate commerce; [that] the prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and the consumer of commodities and the products and byproducts thereof and to facilitate the movements thereof in interstate commerce; [that] such transactions are utilized by shippers, dealers, millers, and others engaged in handling commodities and the products and byproducts thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price[-] that the transactions and prices of commodities on such boards of trade are susceptible to speculation, manipulation and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling commodities and the products and byproducts thereof in interstate commerce, and that such fluctuations in prices are an obstruction to and a burden upon interstate commerce in commodities and the products and byproducts thereof and render regulation imperative for the protection of such commerce and the national public interest therein].

In this revised section 3, the first sentence is reformulated along the definitional lines suggested by Professor Holbrook Working in H. WORKING, *Futures Trading & Hedging*, in SELECTED WRITINGS OF HOLBROOK WORKING 139, 140 (1977). Also, the word "options" is restored to the text of the first sentence. The word "options" was deleted from section 3 by the 1922 Senate Agriculture Committee (it appeared in the bill which had passed the House) on the premise that "options," although "*also 'futures' within the broad meaning of that term*," need not be included in this bill because they are subject to the tax of 20 cents per bushel laid by the future trading act of August 24, 1921 (42 Stat. 187)." S. REP. NO. 871, 67th Cong., 2d Sess 1 (1922) (emphasis added). That tax was declared unconstitutional in *Trusler v. Crooks*, 269 U.S. 475 (1926), however. Since 1936, "options" have been expressly regulated under the Commodity Exchange Act, although section 3 has never been amended to again express the full scope of the statute, which clearly was drafted to embrace options as generic futures. Commodity Exchange Act of 1936, ch. 545, § 4c, 49 Stat. 1491 (current version at 7 U.S.C. § 6c(a) (1976)).